

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

76-6097

United States Court of Appeals

FOR THE SECOND CIRCUIT

F. W. EVERSLEY & CO., INC. & F. W. EVERSLEY & CO., INC., on
behalf of itself and all other persons entitled to share in funds allocated
for the improvement of real property owned by Brownsville Housing
Development Fund Corporation,

Plaintiffs-Appellees,

—against—

BROWNSVILLE HOUSING DEVELOPMENT FUND CORPORA-
TION, CARLA A. HILLS, Secretary of the United States Department
of Housing & Urban Development and MANUFACTURERS HANOVER
TRUST CO.,

Defendants,

CARLA A. HILLS, Secretary of the United States Department of Housing
and Urban Development and MANUFACTURERS HANOVER TRUST
CO.,

Defendants-Appellants.

**BRIEF OF APPELLANT
MANUFACTURERS HANOVER TRUST COMPANY**

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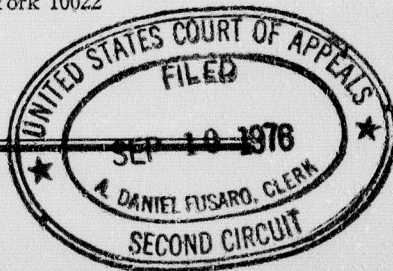


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DOCKET No. 76-6097

F. W. EVERSLEY & CO., INC. & F. W. EVERSLEY & CO., INC., on behalf of itself and all other persons entitled to share in funds allocated for the improvement of real property owned by Brownsville Housing Development Fund Corporation,

Plaintiffs-Appellees,

—against—

BROWNSVILLE HOUSING DEVELOPMENT FUND CORPORATION, CARLA A. HILLS, Secretary of the United States Department of Housing & Urban Development and MANUFACTURERS HANOVER TRUST CO.,

Defendants,

CARLA A. HILLS, Secretary of the United States Department of Housing and Urban Development and MANUFACTURERS HANOVER TRUST CO.,

Defendants-Appellants.

**BRIEF OF APPELLANT
MANUFACTURERS HANOVER TRUST COMPANY**

Preliminary Statement

Appellant Manufacturers submits this brief to supplement the brief of the Government with which it is wholly in accord.

Statement of Issue

Was the judgment of the District Court erroneous in holding that the plaintiff recover of Manufacturers \$572,104.00 with interest, the amount claimed to be due plaintiff from the owner of the property on the theory that Manufacturers was obligated to advance the full amount of an FHA insured mortgage loan for the benefit of the construction contractor even after default by the borrower, despite the clear language to the contrary in the Building Loan Agreement and provision in its agreement with the Department of Housing and Urban Development (HUD) that advances would not be insured unless HUD approved the same; no approval had been given.

Statement of Case

Manufacturers entered into a Building Loan Agreement (B77) with Brownsville Housing Development Fund Corporation (Brownsville), the owner of a housing project, after the Federal Housing Commissioner, acting on behalf of HUD, issued to Manufacturers a Commitment of Insurance of Advances in connection with the project (B146). Brownsville executed and delivered to Manufacturers its mortgage note and mortgage (B86, 93).

Paragraph 5a of the Commitment provides that approval of advances, in accordance with the Building Loan Agreement, must be obtained from HUD prior to the date of each advance to be insured.

The Building Loan Agreement provides (paragraph 4 [a]) that the Borrower shall make monthly applications for advances of mortgage proceeds from the Lender and shall be entitled only to such amount as may be approved by the Lender and the Commissioner. Manufacturers had made every advance which had been approved by the Commissioner; none could be made without such prior approval, since the amount of the advance, if not approved, would not be insured under the specific terms of the Commitment of Insurance of Advances.

Moreover, the Building Loan Agreement (paragraph 4 [e]) provides that Manufacturers shall continue to advance to the Borrower funds as long as the loan remains in balance and the Borrower is not in default thereunder or under the note and mortgage. The Borrower had been in default under the note and mortgage. As of June 1, 1975, this amounted to \$606,704.15 (B144). The defaults had occurred before final closing, which had not taken place (B144). Without final closing, Brownsville was not entitled to any further advance, including the amount calculated as a retention sum under the terms of the Building Loan Agreement.

The plaintiff was on notice of the provisions of the loan agreement. Article 3 of the construction contract provides that all payments are subject to the prior approval of the Lender and HUD and the fulfillment of certain requirements of HUD. Article 9D of the contract makes reference to the Building Loan Agreement (B102).

ARGUMENT

POINT I

Plaintiff's motion for summary judgment should have been denied and Manufacturers' motion for summary judgment dismissing the complaint should have been granted.

The District Court has imposed an obligation on Manufacturers which is in complete disregard of and is repugnant to the agreement into which it had entered with Brownsville, the Borrower, and the FHA insurance commitment.

The District Court, in holding for plaintiff, stated that Manufacturers had acquired a fully completed housing project at a cost less than its actual value and had been unjustly enriched at plaintiff's expense. Not only do the undisputed facts negate this wholly unfounded conclusion, but the Court's later statement demonstrates the error. The Court said:

"It is unfortunate, if true, that the government will lose money upon foreclosure of these properties. But that in no way touches plaintiff's claim of unjust enrichment. That claim cannot be destroyed by the aberrations of the market or the national economy. It speaks as of the date of completion of the project, not the date of foreclosure sale."

The principle of unjust enrichment is wholly inapplicable here. The simple undisputed facts are that Manufacturers agreed to make a mortgage loan for the construction of a low income housing project which HUD, acting through the FHA, agreed to insure on certain conditions. It made every advance under that mortgage loan

as agreed, upon the prior approval of HUD. The award of a judgment against it in favor of the general contractor with whom Manufacturers had no agreement has imposed a substantial obligation on it which it did not undertake and is patently unjust.

CONCLUSION

Manufacturers submitted to the District Court that plaintiff's motion should be denied and that summary judgment should be granted in its favor. *Time, Inc. v. Bernard Geis Associates* (S.D. N.Y. 1968) 293 F. Supp. 130; *Briscoe v. Compagnie Nationale Air France* (S.D. N.Y. 1968) 290 F. Supp. 863; *Highway Truck Drivers & Helpers Local 107 v. Roadway Express, Inc.* (E.D. Pa. 1966) 266 F. Supp. 868; *United States v. Cless* (M.D. Pa.) 150 F. Supp. 687; *Farmers Ins. Exchange v. Allstate Ins. Co.* (E.D. Mich. 1956) 143 F. Supp. 213; *Tripp v. May*, 189 F. 2d 198 (CA 7th 1951); 6 Moore's Federal Practice (2d Ed.) ¶ 56.12.

It is respectfully submitted that the judgment appealed from should be reversed and summary judgment granted in favor of Manufacturers dismissing the complaint.

Respectfully submitted,

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SAMUEL R. RUDEY
Of Counsel

United States Court of Appeals
For the Second Circuit

F. W. Eversley & Co. et al.

Plaintiffs-Appellees

against

Brownsville Housing Development Fund Corporation,
Carla A. Hills et al.

Defendants

Carla A. Hills Secretary of the United States
Department of Housing and Urban Development and
Manufacturers Hanover Trust Co.

Defendants-Appellants

AFFIDAVIT
OF SERVICE

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:

Raymond J. Braddick, agent for Samuel R. Rudey Esq.

being duly sworn,

deposes and says that he is over the age of 21 years and resides at

Levittown, New York.

That on the 10th. day of September, 1976

he served the annexed Brief of Appellant, Manufacturers Hanover Trust Co. upon

Robert B. Fiske
United States Attorney
Att: Peter C. Salerno
One St. Andrew's Plaza
New York, New York

Demov, Morris, Levin & Shein Esqs.
40 West 57th. Street
New York, New York

in this action, by delivering to and leaving with said attorneys

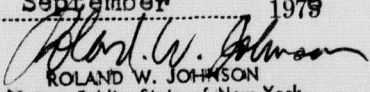
three true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 10th.

day of September 1976


ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

